Supreme Court, U.S.
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No. 95-1696

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOHN CHARNEY, ALICE CHARNEY, JOHN CHARNEY, JR., and BRIAN CHARNEY, a minor, by John Charney, his guardian,

Petitioners,

v.

ELAINE B. PANITZ,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. §1257(a) as well as Sup. Ct. R. 10.1(b) and 10.1(c).

REASONS FOR GRANTING THE WRIT

I.

PETITIONERS RAISED FEDERAL CONSTITUTIONAL ISSUES IN THE SUPERIOR COURT AND THE SUPREME COURT OF PENNSYLVANIA.

The Charneys did raise a federal constitutional issue in the Superior Court of Pennsylvania, which became the highest court in which a decision could be had, since the Supreme Court of Pennsylvania declined to exercise its jurisdiction in this case. The Constitutional issue was raised in the Brief for Appellants in the Superior Court and also in the Petition For Allowance of Appeal to the Supreme Court of Pennsylvania.

The constitutional claim was raised at several times in the Superior Court Brief:

> . . .The Charneys have been wronged, but their right to recover for tortious wrongdoing has been unconstitutionally eliminated.
>
> . . .This should not be the determining factor in destroying the party's constitutional right to redress for tortious wrongdoing.

> It is generally established in this Commonwealth, as in other states, that liability follows tortious wrongdoing. The lower Court's decision in this matter becomes significant because it effectively eliminates the Petitioners' right to recover for a tortious wrongdoing under these circumstances, in clear violation of the Pennsylvania Constitution, Article I, Section 11, and the Fifth, Seventh and Fourteenth Amendments of the United States Constitution.

In their Petition For Allowance of Appeal, the Charneys raised the constitutional issue once again:

> Ordinarily, a Superior Court decision on similar issues would be dispositive of the matter; however, circumstances exist in the present case as the two cases of Panitz v. Behrend and Charney v. Panitz are different enough to exist as separate lawsuits, yet they are closely tied enough to create a gross injustice if the Charneys are denied their day in court.

Also raised was the additional constitutional issue of the awarding of attorney's fees as unconstitutional in the Petition For Allowance of Appeal, which was the first opportunity Petitioner had to do so, since the attorney's fees were assessed by the Superior Court.

> For the same reasons, there is also a violation of Article I, Section 1 of the Constitution of the Commonwealth of Pennsylvania.
>
> It is asserted that the decision to award attorney fees to the opposition, the hired witness, is a violation of the 14th amendment of the United States Constitution, the due process clause.

The Charneys clearly raised a constitutional issue. The Charneys did not need to raise the issue in the "Statement of Questions Involved" as Respondent has set forth. A litigant is not bound to follow any particular form of words or phrases when raising a constitutional issue to a state court. As this Court has previously stated:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

The Charneys raised a constitutional issue before the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania. The Superior Court of Pennsylvania ignored the constitutional issue and failed to address it in its opinion, and the Supreme Court did not exercise its jurisdiction over the case.

II.

THE SUPERIOR COURT OF PENNSYLVANIA BECAME THE STATE COURT OF LAST RESORT WHEN THE SUPREME COURT OF PENNSYLVANIA DECIDED NOT TO EXERCISE ITS JURISDICTION IN THIS MATTER.

Under 28 U.S.C. §1257(a) the Supreme Court review of state court judgments by certiorari relates to final judgments rendered "by the highest court of a State in which a decision could be had. It is the discretion of the Supreme Court of Pennsylvania whether or not to review the judgments of the Superior Court of

Pennsylvania. If a review by the Supreme Court of Pennsylvania is sought and the Court does not exercise its jurisdiction, the Superior Court of Pennsylvania's decision becomes that of the highest court in which a decision could be had.

The basis for granting the Charneys' petition for certiorari exists on this basis.

III.

A CONFLICT DOES EXIST AMONG THE STATE COURTS CONCERNING THE CONSTITUTIONALITY OF EXPERT WITNESS IMMUNITY AS APPLIES TO EXPERTS.

The issue of the constitutionality of expert witness immunity existed in all the cases relied upon by the Charneys, Bruce v. Byrne-Stevens & Assoc. Eng., Inc., 113 Wash. 2d 123, 776 P.2d 666 (1989); James v. Brown, 637 S.W.2d 914 (Tex. 1982); Levine v. Wiss & Co., 97 N.J. 242, 478 A.2d 397 (1984); Matco Forge, Inc. v. Arthur Young & Co., 5 Cal.App. 4th 392, 6 Cal. Reptr.2d 781 (1992) and Murphy v. A.A. Mathews, 841 S.W.2d 671 (Mo. 1992), whether or not it was expressed.

Common law, as well as state statutes, may be reviewed by the Supreme Court of the United States to determine if they are in violation of the Constitution.

The Charneys are asking this Court to determine if it is unconstitutional for the courts of various states at common law to extend expert witness immunity to include the expert witness's statements and representations prior to their testifying. The Charneys' contend that extending expert witness immunity deprives litigants, who employ and depend on these experts, from recovering for injuries sustained from the negligence of the experts under the Due Process clause of the Constitution.

IV.

THIS COURT HAS NOT DECIDED THE CONSTITUTIONAL ISSUE OF EXTENDING WITNESS IMMUNITY TO INCLUDE STATEMENTS AND ACTIONS BEFORE TESTIFYING.

Respondent, relying on Briscoe v. LaHue, 460 U.S. 325 (1983), states that this Court has already decided that the utilization of witness immunity creates no constitutional violation. In Briscoe v. LaHue, the case was based on the perjured testimony of a police officer and brought under a claim pursuant to 42 U.S.C. §1983. This case was not brought under a claim pursuant to 42 U.S.C. §1983 and is not based on perjured testimony.

This claim is based on the statements and actions of an expert witness before testifying and is not based on any testimony given by the expert.

V.

GRANTING REVIEW OF THIS CASE WILL NOT RESULT IN CHAOS AND CONFUSION IN THE STATE COURTS OF ALL FIFTY STATES.

The granting of certiorari by this Court will not result in confusion or chaos in the courts of the fifty states. To the contrary, it will result in the uniformity of the courts on the issue of when expert witness immunity begins.

Expert witness immunity should not extend to the statements and actions of the expert witness before their actual employment begins, during preparation of reports, or during preparation for trial. Litigants depend on expert witnesses when considering the strength of their case and while preparing for trial. They should not be deprived of their due process rights, if the expert witness commits fraud or is negligent in the representation

of their skills, ability and actual "expertise".

VI.

AN ALTERNATIVE BASIS DID NOT EXIST FOR THE DISMISSAL OF EACH OF THE COUNTS OF THE AMENDED COMPLAINT INDEPENDENT OF EXPERT IMMUNITY.

The trial court dismissed the Charneys' case based on expert immunity only. It did not dismiss any of the Counts of the Amended Complaint based on any other grounds.

The Commonwealth of Pennsylvania encourages the trial court to allow amendments to Complaints. If there were deficiencies in the Amended Complaint, the trial court could have granted Petitioner the opportunity to amend their Complaint.

VII.

THIS COURT SHOULD REVIEW THE SUPERIOR COURT OF PENNSYLVANIA'S AWARD OF ATTORNEYS FEES.

The Superior Court of Pennsylvania awarded attorney's fees in this case without notification or hearing on the matter. To do so is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and is contrary to this Court's Opinion in Roadway Express v. Piper, 447 U.S. 752 (1980).

The appeal in this matter was not in any manner frivolous. The Charneys' had appealed the trial court's decision to preserve their rights while the Petition for Allowance of Appeal in the Panitz v. Behrend, 632 A.2d 562, (1993) case, which the Superior Court had found controlling, was before the Supreme Court of Pennsylvania and not yet decided.

CONCLUSION

For all of the aforesaid reasons, the Charneys respectfully request the petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: May 30, 1996